Attorney General
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November 20, 1998

Via Overnight Mail

Commission Secretary
Magalie Roman Salas
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace,* CC Docket No. 96-61; *Implementation of Section 254(g) of the Communications Act of 1934, as amended; and 1998 Biennial Regulatory Review – Review of Customer Premise Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets,* CC Docket No. 98-183.

Dear Ms. Salas:

Enclosed please find the original and five copies of the Comments of the Public Utilities Commission of Ohio in the above referenced docket. Please return one time-stamped copy in the self-addressed, stamped envelope provided.

Thank you for your assistance in this matter.

Respectfully submitted,

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Enclosure

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Before the
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Washington, D.C. 20554

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	)	
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	)	
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INITIAL COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION AND BACKGROUND

On October 9, 1998, the Federal Communications Commission (FCC) issued a Further Notice of Proposed Rulemaking (FNPRM) in CC Docket Nos. 96-61 and 98-183 (In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; and 1998 Biennial Regulatory Review – Review of Customer Premise Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets). In its FNPRM, the FCC examines whether market conditions have changed sufficiently to warrant lifting its restrictions on the bundling (packaging) of customer premise equipment (CPE) and enhanced services with basic telecommunications services.

The Public Utilities Commission of Ohio (Ohio Commission or PUCO) hereby submits its comments pursuant to the FCC's October 9, 1998, invitation for public comment in the above captioned proceedings. Initial comments responding to the FCC's FNPRM are due on November 23, 1998.

DISCUSSION

The FCC requests comment on, among other things, whether the restriction against bundling of CPE with interstate interexchange services is no longer necessary due to meaningful economic competition in both the CPE and interstate interexchange markets. Specifically, the FCC seeks comment on its tentative conclusion that the CPE and interstate interexchange services markets demonstrate sufficient competition to ensure against anti-competitive behavior if interexchange carriers (IXCs) were allowed to bundle CPE with interstate interexchange services. The FCC indicates that commenters should provide empirical data on the level of competition in the interexchange and CPE markets to support their positions. FNPRM at Paragraph 13.

While the Ohio Commission is unable to provide the FCC with the requested empirical evidence as to the actual level of competition in the interstate interexchange and CPE markets, we do believe that it makes sense to allow truly non-dominant interstate interexchange carriers to bundle CPE with interexchange services. The Ohio Commission submits that adopting such a policy will incent non-dominant IXCs to provide customers innovative service packages while simultaneously promoting competitive choices at more economical rates. Specifically, the Ohio Commission maintains that adopting this bundling policy will promote the FCC's three complementary goals identified in this proceeding to promote innovative service packages, to foster competition, and to eliminate outmoded regulations. FNPRM at Paragraph 5.

Additionally, the FCC questions whether the different structures and market conditions in the local exchange, exchange access, and interexchange markets warrant continued CPE unbundling restrictions to local exchange and exchange access markets. FNPRM at 29.

The Ohio Commission submits that these restrictions should continue to be placed on incumbent local exchange carriers (ILECs). The Ohio Commission maintains that competition in the local exchange and exchange access marketplace has not reached a level that would ensure against anti-competitive practices. For example, an incumbent local provider could require a particular preferred CPE be purchased prior to a customer being provided a specific advanced service. Moreover, this CPE could be unneeded or technically inferior to others currently on the market. Such a tying arrangement would neither promote competition nor economic efficiency. The Ohio Commission maintains that a ILEC must also be considered non-dominant in a particular service area or market prior to being permitted to bundle CPE with its local service offerings. On a related matter, the Ohio Commission further notes that if unregulated CPE were bundled with local exchange services and sold at one price it would be more difficult to ensure that the regulated portion of the service was not subsidizing the unregulated CPE. Such a cross subsidization could obviously act to the detriment of the regulated ratepayer and to the detriment of promoting a competitive marketplace.

The FCC seeks comment on jurisdictional issues that may arise if it allows bundling of CPE with local exchange services. In particular, the FCC requests comment on the impact of allowing the bundling of CPE with local exchange service will have on the States' regulation of local exchange service or the FCC's regulation of CPE. FNPRM at Paragraph 30.

The FNPRM incorrectly assumes that the FCC has authority to preempt any regulation by a State commission that addresses a basic local services bundling issue affecting CPE. In reality, the FCC only has statutory jurisdiction over interstate services and its jurisdiction over CPE is ancillary to the interstate services jurisdiction. *See* 47 U.S.C. 152(b) (West 1998). The FNPRM relies on several dated cases for the proposition that Section 152(b) give the FCC sweeping authority to preempt State regulation. FNPRM at footnote 76.

At issue in those cases was the initial deregulation of CPE for the express purpose of promoting competition in the CPE markets, which was done in the wake of the AT&T divestiture in an entirely different context. Further, the regulation or deregulation of CPE in those cases was done independently of any intrastate or local service then being regulated by State commissions. Those cases affirmed the FCC's ability to sever and deregulate CPE from the national telephone network. There was no way to remove CPE from only the interstate calls because the integrated national telephone network handles both interstate and intrastate calls; in that instance, the FCC's deregulation of CPE had to prevail over comparable State regulations.

None of the FCC's prior decisions to deregulate CPE (as upheld in the cases listed in footnote 76 of the FNPRM) had the effect of limiting State pricing authority over basic local service. Unlike the physical network issues involved in removing CPE from the national telephone network and the attendant need for national uniformity, the current FNPRM relates directly to one of the most important State interests in the area of telecommunications regulation: pricing of basic local service. Bundling issues are merely pricing issues. There is no impossibility or inseverability between Federal and State pricing issues for their respective interstate and intrastate jurisdictions. More recent decisions issued by the United States Supreme Court and Federal Circuit Courts make abundantly clear that the pricing authority of State commissions relative to intrastate telephone services is well-protected against any preemption by the FCC.

As the Eighth Circuit recently emphasized after the passage of the 1996 Act, Section 152(b) remains a "Louisiana fence built hog tight, horse high and bull strong" preventing the FCC from asserting jurisdiction over intrastate telecommunications services. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997). Similarly, it is not legally sufficient for the FCC to rely upon the broad Congressional intent to promote competition in support of its tentative conclusion that it has authority to preempt States in this area. *See Louisiana Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 374-375 (1986) (the FCC cannot take preemptive action to advance broad federal policy where the effect is to disregard 47 U.S.C. Section 152(b)'s express jurisdictional limitation). As a result, any decision that circumscribes or limits the authority of State commissions in this area would unnecessarily stage a significant jurisdictional conflict between the FCC and State commissions.

Another important distinction lies in the nature of the proposed action being considered in the FNPRM. In particular, the FCC is considering the *removal* of a current restriction against the bundling of CPE with basic services. If the FCC does decide to remove the restriction, it is not setting forth an affirmative policy of requiring, endorsing or even encouraging the bundling of CPE and basic services. Instead, it is considering the removal of a restriction that might have become unnecessary. There is a big difference between those two types of action and it is important to properly characterize the proposed conclusions in this FNPRM.

If the FCC were to consider an affirmative endorsement of particular bundling practices, questions would arise concerning the creation of State action immunity from antitrust laws. That would certainly be unwise at this time, and does not appear to be contemplated in the current docket. The FCC should make it expressly clear —regardless of the ultimate conclusions reached by the FCC regarding jurisdiction as between the FCC and the States— that that it is not generally endorsing bundling as a marketing practice or otherwise conveying any "State action" antitrust immunity upon carriers who implement CPE bundling practices.

Instead, the plain intent and effect of the tentative findings in the FNPRM is to merely discontinue a regulatory restriction that was previously imposed by the FCC relative to interstate services (the effect on intrastate services was indirect and incidental to the FCC's interstate policy). As such, it is difficult to conclude that the subsequent imposition of a similar regulatory restriction by a State commission relative to intrastate services frustrates any legitimate Federal policy. As the FCC noted, a comparable issue arises when interstate and local services may be packaged in a bundle for marketing purposes. FNPRM at ¶ 30.

Certainly, the mere fact that a carrier would choose to bundle, for marketing purposes, a regulatory mix of services does not abdicate all regulatory jurisdiction over the involved services to the FCC. Such a bootstrapping approach would clearly run afoul of the *Iowa Utilities Board* and *Louisiana PSC* decisions, and is contrary to 47 U.S.C. § 152(b). Yet, that would be the effect of any FCC attempt to preempt State commissions from regulating the bundling of CPE and basic local services, by virtue of the FCC's ancillary jurisdiction over CPE relative to interstate services.

As a result of the foregoing legal issues, the Ohio Commission recommends that the FCC leave it to State commissions, in their jurisdictional role of regulating local exchange service, to determine when the markets of incumbent local exchange companies have become sufficiently competitive to allow the bundling of CPE and basic local exchange services. On a related matter, State commissions should be able to determine what, if any, accounting or non-accounting safeguards should be undertaken as a condition to the bundling of CPE and basic local services. State commissions are well-suited to evaluate the local markets and assess whether an incumbent local exchange carrier to be the dominant carrier in a particular market.

Recognizing that IXCs are entering the local exchange marketplace, the FCC also invites comments on whether there are any anti-competitive effects of allowing any non-dominant IXC to bundle CPE with interstate interexchange services, when such services are packaged with local exchange services and resale of local exchange services. FNPRM at Paragraph 26.

In the event the FCC determines that the level of competition in the CPE and interexchange markets will justify the removal of its unbundling restriction, the Ohio

Commission maintains that it would not be unreasonable to permit non-dominant IXCs to also bundle CPE, local exchange and interexchange interexchange services. Removing these restrictions would help to ensure that the FCC's goals are realized to promote innovative service packages, to foster competition, to eliminate outmoded regulations. Consistent with the above arguments concerning bundling practices affecting local service, however, the Ohio Commission contends that this jurisdictional issue does not distinguish between carriers (whether an incumbent LEC and IXC or a new entrant LEC) and submits that any bundling issue affecting local service should be left to State commissions. The Ohio Commission generally expects that, as the non-dominant provider in the local exchange marketplace, the IXC would not be incented to require tying arrangements or uneconomical service packages. Yet, the actual decision to allow bundling or other similar market pricing strategies relative to basic local service must be left to the States.

The FCC also invites comment on whether it should remove the restrictions on the bundling of enhanced services with interstate interexchange services offered by non-dominant IXCs. In particular, the FCC seeks comment on whether the enhanced services market and the interstate interexchange services market are sufficiently competitive to ensure that non-dominant IXCs could not engage in anti-competitive behavior if the FCC were to eliminate the restrictions on bundling of enhanced services with interstate interexchange services. NPRM at Paragraph 36. Enhanced services are defined as "services offered over common carrier transportation facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." Currently, carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operation. NPRM at Paragraph 33.

The FCC notes that AT&T has previously proposed that the FCC eliminate the prohibition on bundled packages of enhanced services and interstate, interexchange services offered by non-dominant IXCs. FNPRM at Paragraph 34. The FCC requests comment on AT&T's assertion that the rationale underlying the elimination of the CPE bundling restriction applies with equal force to the enhanced services bundling restrictions. FNPRM at Paragraph 37. The FCC also seeks comment on the claim that AT&T and other non-dominant IXCs could discriminate to the advantage of their own enhanced services offerings if such restrictions where removed. FNPRM at Paragraph 36.

The Ohio Commission cannot provide the FCC with any empirical information on the competitiveness of the enhanced services marketplace. The Ohio Commission is not convinced, however, that an apt analogy can be drawn between the reasoning in support of removing the CPE unbundling restrictions and the reasoning in support of removing the enhanced services bundling restrictions. Further, an IXC's enhanced services competitor may be placed in a precarious position if these bundling restrictions were removed. This is because the independent enhanced services provider must purchase the underlying services from an IXC, which may also provide enhanced services. In any event, any specific problems over the FCC's proposal on this matter would be more appropriately brought forth by enhanced service providers that do not also provide interexchange carrier services.

The FCC requests comment on the broader question of whether to amend the enhanced services restrictions to allow these services to be bundled with local exchange and exchange access services. The FCC also requests comment on whether the market conditions between local exchange service and interexchange services warrant different treatment of the services (i.e., whether the restrictions should continue on local exchange services). NPRM at Paragraph 40. Finally, the FCC invites comment on what impact allowing the bundling of enhanced services with local exchange services would have on the states' jurisdictions.

As mentioned above, if the FCC the finds the level of competition in the enhanced services and interexchange markets will support the removal of the enhanced services restrictions for IXCs, the Ohio Commission maintains that it is appropriate to continue to apply these restrictions to ILECs since significant competition does not yet exist in the local exchange marketplace. Moreover, as mentioned above concerning the bundling of CPE with local exchange services, the Ohio Commission maintains that the FCC cannot preempt State regulation of bundling/pricing issues involving local service. Moreover, States are best positioned to determine when such restrictions should be removed in the local exchange marketplace.

CONCLUSION

The Ohio Commission wishes to thank the FCC for the opportunity to file comments in this proceeding.

Respectfully submitted,

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